

NOTICE OF PRELIMINARY DRAFT OF
PROPOSED AMENDMENTS TO LOCAL RULES
U.S. DISTRICT COURT, DISTRICT OF ALASKA.

Comments are sought on proposed amendments to Local Rules

[Civil and Criminal]

All Comments received become part of the permanent files on the rules.

Written comments on the preliminary draft rules are due not later than July 31, 2006

Address all communications on rules to:

United States District Court, District of Alaska
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Rule 24.1 Procedures for Notification of Any Claim of Unconstitutionality [*Abrogated. See* FED. R. CIV. P. 5.1]

COMMENT: The subject matter of this rule is now covered by FED. R. CIV. P. 5.1 adopted effective December 1, 2006.

Rule 32.1 Sentencing Procedure

(a) **Scheduling.** Unless otherwise ordered by the court, imposition of sentence will be scheduled no earlier than seventy-two (72) days after conviction.

(b) **Confidential Recommendation.** Unless otherwise ordered by the court, the confidential sentencing recommendation accompanying the presentence report is to be disclosed to counsel concurrently with the disclosure of the final presentence report..

(c) **Final Presentence Report.** Not less than fifteen (15) days prior to the sentencing date, the final presentence report will be disclosed to counsel.

(d) **Sentencing Memoranda.**

(1) Not less than seven (7) days before the sentencing hearing, all counsel in the case must file with the court and serve on opposing counsel and the probation officer a sentencing memorandum.

(2) The sentencing memorandum must:

[A] indicate if there is no disagreement with the presentence report;

[B] indicate whether or not it is contended that a sentence within the Sentencing Guideline range is reasonable;

[C] cite all controlling authority relevant to disputed guideline issues; and

[D] may be supported by affidavits, statements, and records as appropriate.

(e) **Sentencing Factors.**

(1) If counsel intends to argue that the court depart from the sentencing guidelines, the sentencing memorandum must:

[A] identify the grounds for departure;

[B] cite the statute and guideline permitting the departure; and

[C] justify the recommended departure.

(2) If the Government moves to depart on the basis that the defendant has provided substantial assistance to the Government in an investigation or prosecution, the government's motion:

[A] is to be filed separately, and under seal if appropriate; and

[B] the government must make a specific recommendation of the extent to which departure should be made and the reasons that justify the departure.

(3) If counsel intends to argue that a factor enumerated in 18 U.S.C. § 3553(a), other than paragraphs (4) and (5), is relevant to the imposition of sentence:

[A] identify the factor by reference to the paragraph of § 3553(a);

[B] cite all controlling authority relevant to the factor, if any;

[C] briefly state the facts in support of the contention, including reference to any evidence supporting the existence of the fact; and

[D] state with particularity the effect contended the application of that factor should have on the sentence imposed.

(f) **Evidentiary Hearing.** If a party deems an evidentiary hearing to be necessary, not later than concurrently with the filing of the Sentencing Memorandum under subsection (d), but as a separate pleading:

(1) a motion for an evidentiary hearing is to be served and filed on shortened time; and

(2) the court advised of—

[A] the nature and extent of the evidence, and

[B] an estimate of time necessary for the hearing.

(g) **Duties of Counsel.** Defense counsel must review both the draft presentence report and the final presentence report with the defendant(s).

Related Provisions:

18 U.S.C. § 3143	Release or detention of a defendant pending sentence or appeal
18 U.S.C. § 3551	Authorized sentences
18 U.S.C. § 3552	Presentence reports
18 U.S.C. § 3553	Imposition of a sentence
18 U.S.C. § 3559	Sentencing classification of offenses
18 U.S.C. § 3561	Sentence of probation
18 U.S.C. § 3571	Sentence of fine
18 U.S.C. § 3581	Sentence of imprisonment
18 U.S.C. § 3583	Inclusion of a term of supervised release after imprisonment
United States Sentencing Guidelines	
F.R.Cr.P. 32	Sentence and Judgment
F.R.Cr.P. 46	Release From Custody

COMMENT: The title of the section has been amended to clarify that the section applies to all sentencing, not just sentencing under the now “advisory” Guidelines. *United States v. Booker*, 543 U.S. 220 (2005).

Subsection (b) amended to provide for the disclosure of the confidential recommendation to counsel unless otherwise ordered by the court. [Current rule prohibits disclosure unless otherwise ordered by the court; *this amendment reverses the current practice.*]

Subparagraph(d)(2)[B] (new) requires the parties to state their contentions as to the reasonableness of a sentence with the Guideline range. [Sentences within the Guideline range are not presumptively “reasonable.” *United States v. Plouffe*, 445 F.3d 1126, 1128–29 (9th Cir.2006).] NOTE: Current subparagraphs [B] and [C] have been redesignated as [C] and [D], respectively.

Subsection (e) has been re-titled to eliminate its application to solely the Guidelines. Paragraph (3) [new] requires that the parties provide each party’s position concerning the sentencing factors set out in 18 U.S.C. § 3553(a) and the basis for the party’s position as well as the impact it is contended that consideration of that factor should have on the sentence imposed.

Current paragraphs (e)(1) and (2) were retained without change. Although under *Booker* the Guidelines are now advisory instead of mandatory, the court in imposing a sentence must still in every case consider the guidelines; indeed, the court should use them as a starting point. *United States v. Zavala*, 443 F.3d 1165, 1169 (9th Cir.2006); *United States v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir.2006). Post-*Booker* controlling decisions have made clear that insofar as the interpretation and application of the Guidelines are concerned, other than that they be considered advisory, there has been no change. These provisions therefore retain the same relevance as they did pre-*Booker*.

Rule 32.1.1 Revocation of Probation or Supervised Release

(a) Initial Appearance.

(1) Upon the filing of a petition alleging a violation of the conditions of probation or supervised release supervision, an initial appearance will be held before a magistrate judge.

(2) If the person is in custody:

[A] the initial appearance will be scheduled within ten (10) days after the petition is filed; and

[B] the hearing on a motion for release pending the revocation hearing may be combined with the initial appearance.

(b) Agreed Modification.

(1) If the parties agree upon a modification of the condition(s) or term of probation or supervision in lieu of revocation, the probation officer will prepare a Petition to Modify the Conditions of Supervision and a Waiver of Hearing and Consent to Modify for the parties approval.

(2) The petition and waiver will be forwarded to the appropriate judicial officer for approval or rejection.

(3) If modification is approved by the court, unless further action by the court is required, the government must move the court to dismiss the petition with or without prejudice.

(c) Evidentiary Hearings. If the defendant denies the allegations of violation(s) of the conditions of probation or supervised release, an evidentiary hearing on the merits of the petition will be scheduled without undue delay.

(1) Evidentiary hearings will be heard by a magistrate judge if:

[A] sentence was imposed by a magistrate judge; or

[B] referred by a district judge when sentence was imposed by a district judge.

(2) Upon conclusion of an evidentiary hearing referred to a magistrate judge under subparagraph (c)(1)(B), a report and recommendation(s) regarding the violation(s) will be filed and distributed to the government, defense counsel or defendant if not represented by counsel, and the probation officer.

[A] Any objection to the report and recommendation(s) must be:

(i) filed within ten (10) days of the date distributed; and

(ii) is governed by D.Ak. LMR 6.

[B] If no objection is timely filed, the court may adopt the report and recommendations(s) without further hearing or notice to the parties.

(d) Disposition Hearing. Upon the entry of an order finding a violation, unless the court finds that there is sufficient information in the record to enable the meaningful exercise of sentencing authority under 18 U.S.C. §§ 3553, 3565, or 3583, the court will set the matter of a disposition hearing.

(e) Disposition Reports.

(1) The court may order the Probation Office to conduct a disposition investigation and prepare a disposition report.

(2) Unless otherwise ordered by the court:

[A] Not less than five (5) days prior to the disposition hearing the disposition report must be disclosed to counsel of record. A disposition report is presumed to have been disclosed—

(i) when a copy of the report is physically delivered, or

(ii) three (3) days after a copy of the report is sent electronically or mailed; and

[B] Not less than two (2) days prior to the disposition hearing—

(i) the probation officer must furnish the court with a copy of the disposition report, addendum, and a confidential sentencing recommendation, and

- (ii) any objections to the disposition report must be filed with the court and served on opposing counsel and the probation officer.
- (3) Defense counsel must review the disposition report with the defendant.
- (4) Unless otherwise ordered by the court, the confidential recommendation accompanying the disposition report will be disclosed to counsel concurrent with disclosure of the disposition report.
- (f) **Hearing on Disposition Report.** If either party deems an evidentiary hearing on the disposition report is necessary, a Motion for an Evidentiary Hearing may be filed on shortened time.
 - (1) The motion must advise the court of:
 - [A] the nature and extent of the evidence; and
 - [B] counsel's estimate of time necessary to offer the evidence.
 - (2) At the hearing the court may:
 - [A] consider material submitted by the parties without regard to admissibility at trial, provided that the material submitted is deemed credible by the court; and
 - [B] in appropriate cases, consider testimony.
- (g) **Disposition Agreements.** Any revocation disposition agreement must be either:
 - (1) placed on the record in open court; or
 - (2) reduced to writing and contain written approval by the United States Attorney or designee, counsel for the defendant, and the defendant.

Related Provisions:

18 U.S.C. § 3143	Release or detention of a defendant pending sentence or appeal
18 U.S.C. § 3401	Misdemeanors; application of probation laws
18 U.S.C. § 3553	Imposition of a sentence
18 U.S.C. § 3565	Revocation of Probation
18 U.S.C. § 3583	Inclusion of a term of supervised release after imprisonment
United States Sentencing Guidelines	
F.R.Cr.P. 32.1	Revocation or Modification of Probation or Supervised Release
F.R.Cr.P. 45	Computing and Extending Time
F.R.Cr.P. 46	Release From Custody
D.AK. LCrR 46.1	Bail Hearings; Pretrial Release
D.Ak. LMR 6	Objections to Dispositive Matters Under 28 U.S.C. § 636(b)(1)(B) in Criminal Matters

COMMENT:

Subparagraph (c)(1)[B] amended to clarify that referral by a district judge is not automatic consistent with current practice and procedure.

Subsection (e) has been significantly amended to conform to actual practice. As revised, disposition hearings may routinely be held two weeks after the court enters a finding that a violation has occurred.

Paragraph (e)(1) is amended to delete the 40-day requirement before a disposition hearing is held and making the preparation of the disposition report optional with the court.

Paragraph (e)(2) has been amended by deleting the requirement for a draft disposition report (subparagraphs [A] – [D] eliminated). As this process has proven unnecessary, its elimination will reduce the time for processing the disposition report.

Subparagraph (e)(2)[A] [formerly (e)(2)[E]] has been amended to provide for the disclosure of the final disposition report five days prior to the disposition hearing.

Clause (e)(2)[A](ii) was amended to clarify that the three-day rule applies to any means of electronic transmission, by e-mail or facsimile. Thus, if sent by mail or electronically, the disposition report must be sent not later than eight days before the disposition hearing.

Subparagraph (e)(2)[B] is former (e)(2)[F] reducing the time frame from five to two days.

Subparagraph (e)(2)[G] was eliminated. With the shortened time frame for filing objections to the disposition report, the probation officer's response, if any, will be made and resolved at the hearing.

Paragraph (e)(4) amended to provide for the disclosure of the confidential recommendation to counsel unless otherwise ordered by the court. [Current rule prohibits disclosure unless otherwise ordered by the court; *this amendment reverses the current practice.*]

NOTE: The times specified in this rule are governed by the provisions of FED. R. CRIM. P. 45(a)(2) excluding intervening weekends and holidays.